No. 91-7051

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ANA FEIJOO TOMALA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury as to the definition of knowledge.

2. Whether the Double Jeopardy Clause precluded a retrial after the district court declared a mistrial because of the jury's inability to reach a unanimous verdict.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-7A) is unreported, but the judgment is noted at 946 F.2d 883 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1991. A petition for rehearing was denied on November 4, 1991. Pet. App. B. The petition for a writ of certiorari was filed on January 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a second jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of

importing cocaine into the United States, in violation of 21 U.S.C. 952(a). She was sentenced to 60 months' imprisonment and a four-year term of supervised release. The court of appeals affirmed. Pet. App. 1A-7A.

1. On October 28, 1989, petitioner, who was traveling with her two young daughters, arrived at Kennedy International Airport on a flight from Ecuador. She carried four bags, three of which she had checked as luggage; two of the checked bags were soft-sided, and the third was hard-sided. At Customs, petitioner produced her passport, Customs declaration, and airline ticket. In response to a question by a Customs inspector, petitioner explained that she had been on vacation in Ecuador with her children. Throughout her conversation with the inspector, petitioner was very calm and cooperative. 11/29/90 Tr. 85-86.

The inspector told petitioner that he would like to inspect her luggage. Petitioner remained calm and lifted one of the soft-sided bags onto a conveyer belt for examination. After examining the bag and finding nothing amiss, the inspector asked to examine a second bag. Maintaining her composure, petitioner reached for the second soft-sided bag. The inspector indicated, however, that he wished to examine the hard-sided bag. Petitioner's demeanor immediately changed; her "face change[d]," she became "very serious and very stiff," and she was "[n]ot as helpful as before." 11/29/90 Tr. 89. As the inspector examined the bag, petitioner "suddenly froze in her tracks" and ceased cooperating entirely.

11/29/90 Tr. 93. She paced back and forth, jangled her keys, and alternately moved her hands in front of her and behind her. Ibid.

The only visible contents of the second suitcase were several apparently new dresses. After noticing a weight imbalance in the suitcase, the inspector probed further and discovered a false panel in the suitcase, inside of which were secreted several bags containing three kilograms of cocaine. When the inspector opened the false panel, petitioner "went crazy," began pounding the table, and yelled: "Damn it, why should I bring this here? Why should I bring it for this woman? This woman gave it to me in the airport in Ecuador." 11/29/90 Tr. 96, 99, 123; 12/3/90 Tr. 340. After making several similar statements, petitioner shrugged her shoulders and stated that she did not know what the substance hidden in the bags was. Ibid.

The inspector arrested petitioner and advised her of her Miranda rights. After waiving her rights, petitioner repeated that a woman had given her the suitcase in which the cocaine had been found. 11/29/90 Tr. 126. Petitioner disclaimed any prior knowledge of the cocaine. She explained that while she was standing at the airline counter at the airport in Ecuador, a total stranger her approached her, called her by name, and identified herself as "Maria Alcivar." According to petitioner, Alcivar had handed her the suitcase and instructed her to deliver it to Alcivar's sister, "Georgina de Rodrigues" -- a person petitioner did not know. Petitioner further stated that Alcivar had not told her where and how to deliver the suitcase; rather, Alcivar had

merely provided her with an envelope and a piece of paper containing an incomplete New Jersey address and a New Jersey area code followed by an eight-digit telephone number. The address contained a semi-legible street name and the words "New Jersey," spelled phonetically. However, the paper, which petitioner provided the inspector, failed to specify the town or city in which Rodrigues lived. Petitioner stated that she did not know where Rodrigues lived or her actual telephone number. 11/29/90 Tr. 137-143.

2. Petitioner testified in her own defense at trial, claiming to have been duped into carrying cocaine into the United States. Petitioner stated that she had gone to Ecuador to obtain a permanent U.S. residence visa for her youngest daughter, an Ecuadoran citizen. 12/3/90 Tr. 301. Petitioner testified that a neighbor and co-worker, Mercedes Moran, had asked petitioner to deliver a letter to Moran's sister, and that she had done so. 12/3/90 Tr. 303-304. Moran's sister later telephoned petitioner and asked her to take a letter back to Moran. Petitioner agreed to do so, but was unable to tell Moran's sister when she would be leaving Ecuador. 12/3/90 Tr. 305-306.

Petitioner further testified that while she was standing at the airline counter prior to her return to the United States, a stranger called her name, identified herself as Maria Alcivar, and asked petitioner to carry a letter to Mercedes Moran, whom Alcivar identified as her cousin. According to petitioner, Alcivar asked her to deliver a suitcase to Alcivar's sister, Georgina De Rodrigues, whom petitioner did not know. Alcivar then gave

petitioner the envelope and paper that petitioner had supplied to the Customs inspector. Petitioner testified that Alcivar opened the suitcase to show petitioner the dresses inside, explaining that she was returning the dresses to her sister because she had been unable to sell them in Ecuador. Alcivar then disappeared. Petitioner further testified that she again checked the contents of the bag and then labeled the bag in her own name. 12/3/90 Tr. 310-317.

Petitioner, who had completed high school and earned a teaching certificate, 12/3/90 Tr. 323, claimed not to have noticed that the telephone number that Alcivar gave her contained an area code plus eight digits, rather than seven, and that the purported address did not include a town or city. She also testified that Alcivar gave her no instructions beyond telling her to call Rodrigues when she arrived home, and that Alcivar did not tell her what to do if she could not reach Rodrigues. 12/3/90 Tr. 337-339.

3. In its final charge, the district court instructed the jury:

> [T]he government must prove, beyond a reasonable doubt, that [petitioner] knew that the materials she possessed were narcotics. If [petitioner] lacks this knowledge -- if [petitioner] lacks this knowledge -- of course, you must bring in a verdict of acquittal.
>
> If [petitioner] lacks this knowledge then you must find her not guilty. * * * Even if the government proves that the only reason [petitioner] lacked such knowledge was because she was careless, negligent, or even foolish in failing to obtain it. That is not sufficient, the government must prove beyond reasonable doubt that she had that knowledge.
>
> However, it is not necessary for the government to prove to an absolute certainty that [petitioner] knew that she possessed narcotics. [Petitioner's] knowledge may be established by proof beyond a reasonable doubt that [petitioner] was aware, was aware of a high probability that the suitcase contained narcotics unless, despite this high probability, the facts show that [petitioner] actually believed that the suitcase did not contain narcotics.

12/4/90 Tr. 438-439.

3. The court of appeals affirmed petitioner's conviction. Pet. App. A1-A7. The court rejected petitioner's claim that the district court erred in instructing the jury concerning the knowledge element of the offense. Petitioner claimed that what she termed a "conscious avoidance" instruction was not warranted because the government offered no proof that petitioner had purposely avoided learning of the hidden cocaine. The court found the instruction to be appropriate "when the evidence demonstrates that the circumstances would have alerted a reasonable person [to] the unlawful nature of his conduct." Pet. App. A6. The court concluded that "[g]iven [petitioner's] view of the facts that included accepting a suitcase from a stranger to be brought to the United States without further intelligible instructions, the district court was more than justified in concluding that the conscious avoidance charge was warranted." Pet. App. A6-A7.

The court also rejected petitioner's claim that the district court denied her rights under the Double Jeopardy Clause when it declared a mistrial after the jury was unable to reach a verdict in her first trial. The court of appeals found that the declaration of a mistrial was manifestly necessary, after the district court

gave an Allen charge twice, and after the jury had three times announced that it was hopelessly deadlocked. Pet. App. A3.

ARGUMENT

1. The district court's instruction concerning the knowledge element of petitioner's offense is in our view unexceptionable. The instruction had its origin in the Model Penal Code § 2.02(7), which states:

> When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

That definition of knowledge was approved by this Court in Leary v. United States, 395 U.S. 6 (1969). In Leary, the defendant was charged with smuggling marijuana "knowing the same to have been imported." Id. at 10-11 & n.1. In determining the scope of the term "knowing," the court "employed as a general guide the definition of 'knowledge' which appears in [the Model Penal Code]." Id. at 46 n.93. Similarly, in Turner v. United States, 396 U.S. 398, 416 & n.29 (1970), the Court, citing Leary, employed the same definition of knowledge to conclude that the defendant "was aware of the 'high probability' that * * * heroin in his possession had originated in a foreign country," and that he thus "doubtless knew that the heroin he had came from abroad." See also Barnes v. United States, 412 U.S. 837, 845 (1973). The instruction is commonly used in "conscious avoidance" or "deliberate ignorance" cases, in which the defendant asserts that he lacked knowledge of

a crucial material fact -- frequently, as here, the fact that the materials in his possession were drugs.[1]

Although petitioner, the government, and the court of appeals referred to this instruction as a "conscious avoidance" instruction, the instruction in reality simply defines for the jury the level of certainty of a fact required to constitute "knowledge" of that fact for purposes of the criminal law.[2] In ordinary life, absolute certainty of facts -- other than those we directly perceive -- is rare or impossible. To require that a criminal defendant achieve such certainty before he can be said to "know" an operative fact would preclude conviction in virtually any case in which a defendant has committed an offense in reliance on information supplied by others. A defendant charged with knowingly receiving stolen property could not be convicted unless he himself

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[1] See Model Penal Code § 2.02(7), Comment (Definition of knowledge "deals with the situation British commentators have denominated 'wilful blindness' or 'connivance,' the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist."). For representative criminal cases in which the use of the instruction, or one of its variations, has been approved, see note 7, infra.

[2] Courts have sometimes employed other language, not including the Model Penal Code definition of knowledge, to address the conscious avoidance issue. See, e.g., United States v. Lara-Velasquez, 919 F.2d 946, 950-953 (5th Cir. 1990); United States v. DeVeau, 734 F.2d 1023, 1028 (5th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); United States v. Bigelow, 914 F.2d 966, 969-971 (7th Cir. 1990), cert. denied, 111 S. Ct. 1077 (1991); United States v. Hiland, 909 F.2d 1114, 1129-1131 (8th Cir. 1990); United States v. Valle-Valdez, 554 F.2d 911 (9th Cir. 1977); United States v. Gold, 743 F.2d 800, 822 (11th Cir. 1984), cert. denied, 469 U.S. 1217 (1985).

stole it;[3] a defendant charged with mail fraud could not be convicted absent direct evidence that he personally prepared and submitted the false bills upon which the scheme was based;[4] and a defendant, like petitioner, charged with importing drugs could not be convicted unless she personally observed the drugs in her suitcase. There is no evidence that Congress, when it drafted the applicable federal criminal statutes, intended such extreme results.

The form of the instruction used in this case, which tracks in all pertinent respects the Model Penal Code formulation approved by this Court, is accordingly correct. In a series of cases, the Second Circuit has approved the use of the instruction "when the evidence demonstrates that the circumstances would have alerted a reasonable person [to] the unlawful nature of his conduct." Pet. App. A6. See also United States v. Mang Sun Wong, 884 F.2d 1537, 1541 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990); United States v. Feroz, 848 F.2d 359, 360 (2d Cir. 1988) (citing cases); United States v. McBride, 786 F.2d 45, 50 n.1, 51 (2d Cir. 1986). The Second Circuit has recognized that the instruction is commonly used, see United States v. Lanza, 790 F.2d 1015, 1022 (2d Cir.),

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[3] Cf., e.g., United States v. Jacobs, 475 F.2d 270, 287-288 (2d Cir.), cert. denied, 414 U.S. 821 (1973) (approving of use of Model Penal Code instruction where defendant is charged with receiving stolen property); United States v. Norwood, 798 F.2d 1094, 1098-1099 (7th Cir.) (same).

[4] Cf., e.g., United States v. Kaplan, 832 F.2d 676, 682-683 (1st Cir. 1987), cert. denied, 485 U.S. 907 (1988) (approving of use of Model Penal Code instruction where defendant is charged with mail fraud based on scheme to submit fraudulent medical bills).

cert. denied, 479 U.S. 861 (1986), and has held that the instruction may be given even in cases in which the government's primary theory is that the defendant was fully aware of the relevant fact. Mang Sun Wong, 884 F.2d at 1542.

Although we believe that the Model Penal Code instruction was a correct statement of the law and was properly given on the facts of this case, we agree with petitioner that the use of the instruction would likely have led to a different result had this case arisen in the Tenth Circuit. In two recent cases, for example, in which the defendants were charged with possession of drugs in circumstances quite analogous to those present here, the Tenth Circuit reversed the resulting convictions on the ground that an instruction like the one given in this case should not have been given.

In United States v. de Francisco-Lopez, 939 F.2d 1405 (10th Cir. 1991), the defendant was driving a car that had been altered to contain cocaine in a hidden compartment. He testified concerning the "unusual" circumstances under which he obtained the car from an individual named "Juan" in Los Angeles, who instructed him to drive it to New York "with minimal direction where he was to drop off the car." Id. at 1407; see also id. at 1417-1418 (Baldock, J., dissenting). He also testified that "he suspected at some point the car may have had drugs in it, but he dismissed the idea." Id. at 1411. The trial judge, employing a formulation almost identical to that used in this case, instructed the jury that:

> The defendant's knowledge may be established by proof that the defendant was aware of a high probability that the materials were narcotics unless despite this high probability the facts show that the defendant actually believed that the materials were not narcotics.

939 F.2d at 1411.

The Tenth Circuit reversed, holding that the instruction, which in its view "is rarely appropriate," 939 F.2d at 1405, improperly subjected the defendant "to an inference that he negligently avoided knowledge of the existence of drugs." Id. at 1412. According to the court, the instruction should not be given "unless evidence, direct or circumstantial, shows that defendant's claimed ignorance of an operant fact was deliberate." Id. at 1410. The court stated that "the same evidence cannot be used as proof for the mutually exclusive categories of actual knowledge of an operant fact and deliberate ignorance of that same fact" and "the deliberate ignorance instruction must not be tendered to the jury unless sufficient independent evidence of deliberate avoidance of knowledge has been admitted." Ibid. See also United States v. Galindo-Torres, No. 91-2020 (10th Cir. Jan. 30, 1992) (following Francisco-Torres on virtually identical facts). The Tenth Circuit's reasoning and results in Francisco-Lopez and Galindo-Torres are thus inconsistent with the reasoning and result of the Second Circuit in this case.[5]

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[5] The Tenth Circuit's decisions in Francisco-Lopez and Galindo-Torres appear to depart from prior Tenth Circuit cases in which use of the instruction was approved. See, e.g., United States v. Ochoa-Fabian, 935 F.2d 1139 (10th Cir. 1991), pet. for cert. pending, No. 91-6905; United States v. Fingado, 934 F.2d 1163 (10th Cir.), cert. denied, 112 S. Ct. 320 (1991).

The Ninth Circuit has taken a different approach to the use of the Model Penal Code definition of knowledge. Although that court has not disapproved the Model Penal Code instruction as such,[6] it has reversed convictions in which the Model Penal Code instruction was given if the evidence, in the court's view, did not present a question of deliberate ignorance. In those cases, as the court viewed the evidence, the defendant "had either actual knowledge or no knowledge at all of the facts in question." United States v. Sanchez-Robles, 927 F.2d 1070, (9th Cir. 1991) (emphasis in Sanchez-Robles; quotation omitted); see also United States v. Garzon, 688 F.2d 607 (9th Cir. 1982); United States v. Beckett, 724 F.2d 855 (9th Cir. 1984); United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096 (9th Cir. 1985). Like the Tenth Circuit cases, those decisions appear to rest on the proposition that the instruction causes "the risk that a jury might convict a defendant on mere negligence," Sanchez-Robles, 927 F.2d at 1073, and that it may thus be harmful error to use the instruction in a case in which "there were no suspicious circumstances surrounding the activity beyond direct evidence of the illegality itself, which goes only to actual knowledge." Ibid. In light of those holdings, the facts of this case may well have given rise to a contrary result had it arisen in the Ninth Circuit.

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[6] In United States v. Jewell, 532 F.2d 697 (9th Cir. 1976 (en banc), a leading case on the subject, both the majority, see id. at 700-702, 704 n.21, and dissenting opinions, see id. at 706-707 (Kennedy, J., dissenting), approved of the Model Penal Code formulation.

In our view, both the Ninth and Tenth Circuits have improperly limited the use of the Model Penal Code definition of knowledge -- the Tenth Circuit by authorizing its use only "rarely," if at all, and the Ninth Circuit by confining its use to cases in which the evidence points to conscious avoidance by the defendant. If, as we submit, the Model Penal Code definition properly defines the term "knowledge," as that term is used in federal criminal statutes, there should be no reason to reverse convictions when that definition is given, even if the facts of the case do not suggest conscious avoidance. If, as most circuits have held,[7] the instruction is a correct statement of the law, it is difficult to envision any circumstance in which its use could constitute reversible error. If the instruction is directly applicable to the facts of the case, as it was here, then a court is obligated to give it upon request. And if the instruction is not directly applicable to a particular case -- i.e., if the degree of certainty with which a defendant knows a fact is not an issue in the case -- then instructing the jury on a legally correct, but irrelevant, definition of knowledge would be at worst harmless error. Cf. Griffin v. United States, 112 S. Ct. 466 (1991).

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[7] See, e.g., United States v. Picciandra, 788 F.2d 39, 46-47 (1st Cir.), cert. denied, 479 U.S. 847 (1986); United States v. Caminos, 770 F.2d 361, 365-366 (3d Cir. 1985); United States v. Hester, 880 F.2d 799, 801-803 (4th Cir. 1989); United States v. Batencort, 592 F.2d 916 (5th Cir. 1979); United States v. Buckley, 934 F.2d 84, 88 (6th Cir. 1991); United States v. Kehm, 799 F.2d 354, 362 (7th Cir. 1986); United States v. Peddle, 821 F.2d 1521 (11th Cir. 1987).

In sum, we agree with petitioner that the circuits are in conflict concerning whether an instruction such as the one given in this case properly defines "knowledge" for purposes of the criminal law and thus can properly be given whenever knowledge is an issue in a criminal case. Since the issue arises quite frequently, further review by this Court to resolve the conflict is warranted.

2. Petitioner also claims (Pet. 16-18) that the Double Jeopardy Clause barred her second trial because there was no "manifest necessity" for the declaration of a mistrial at her first trial. The court of appeals properly rejected that claim.

a. Petitioner's first trial began on Wednesday, June 6, 1990. The government presented its entire case that day, and the defense began its presentation of evidence. The defense completed its case on June 7. The following morning, Friday, June 8, both sides gave their summations and the court gave its charge to the jury. At 12:26 p.m., the jury began its deliberations. 6/8/90 Tr. 96.

At 4:05 p.m., the jury sent a note to the court stating that it could not reach a unanimous decision. The court brought the jury back into the courtroom and, without objection by petitioner, delivered a modified Allen charge. At 4:16 p.m. the jury recommenced its deliberations. Half an hour later, the jury returned to the courtroom to rehear relevant testimony that it had earlier requested to have reread. At 5:00 p.m. the jury again retired to continue its deliberations. 6/8/90 Tr. 103-108.

Subsequently, the jury sent another note indicating that it was deadlocked. The judge expressed concern that the jury was not

taking the matter seriously, inasmuch as two jurors had been laughing during the Allen charge, and another juror did not seem to think the case was very important. The judge told the parties that he would instruct the jury to take its deliberations more seriously and would ask them if they wished to return Monday to continue their deliberations. 6/8/90 Tr. 108-109.

Thereafter the court instructed the jury about the serious nature of jury service and the need to make every attempt to reach a verdict. When one juror advised the court that there were "extremes at each end," and that he did not think the jury would be able to reach a verdict (6/8/90 Tr. 110), the court instructed the jury to try again: "I just want you to try, just try it again * * *. Go back and see if you can reach some sort of conclusion. If you can't, I am not going to force you, you understand that." Ibid. Defense counsel indicated his approval of that charge. Id. at 111. The jury again retired to deliberate at 5:15 p.m. Id. at 110.

Thirty minutes later, at 5:45 p.m., the jury sent a final note indicating that it still had not reached a unanimous verdict, and that one juror for religious reasons could not deliberate past 6:00 p.m. Both parties indicated a willingness to have the jury continue its deliberations the following Monday. The court voiced its doubt that further deliberations would prove useful, but stated that it would first speak to the foreman to determine if a verdict was possible. 6/8/90 Tr. 111. The court stated that it was "perfectly willing to come Monday, but if it's useless, what's the

point?" Id. at 111-112. Thereafter, the following colloquy occurred:

> THE COURT: [T]he real important issue is whether or not you can possibly come to a decision. Now, will the foreman stand up? Do you think you can come to a decision if you come here Monday?
>
> THE FOREMAN: No.
>
> THE COURT: Anyone else think they can come to a decision if we have further deliberations Monday? Anyone think that? Is it possible, you believe?
>
> THE FOREMAN: Agreed.
>
> THE COURT: Do you want to come in Monday?
>
> THE FOREMAN: We were talking in the room we said Monday but then some people said also they wouldn't change their mind. They wouldn't change their mind whatever happen[s].
>
> THE COURT: Members of the jury, I declare a mistrial because of your failure to get together * * *. The jury is hereby dispersed * * *.
>
> [DEFENSE COUNSEL]: If we have to report next week anyway, if the juror has the --
>
> THE COURT: I understand that, but you heard me declare a mistrial.
>
> [DEFENSE COUNSEL]: Yes, your Honor.
>
> THE COURT: I have my reasons. I brought it out from this foreman that it doesn't look like they can ever get together. Is that right, Mr. Foreman?
>
> THE FOREMAN: Yes.
>
> THE COURT: Is there any possibility of you getting together Monday?
>
> JUROR #6: I don't think so.
>
> THE COURT: The jurors are dispersed. It's a mistrial.

6/8/90 Tr. 112-113.

b. It is well established that a jury's inability to agree on a verdict constitutes a "manifest necessity" justifying a retrial, United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (Story, J.), and this Court has "constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." Richardson v. United States, 468 U.S. 317, 324 (1984); accord Oregon v. Kennedy, 456 U.S. 667, 672 (1982) ("While other situations have been recognized by our cases as meeting the 'manifest necessity' standard, the hung jury remains the prototypical example."); Arizona v. Washington, 434 U.S. 497, 509 (1978). Moreover, "[t]he trial judge's decision to declare a mistrial when he considers the jury deadlocked is * * * accorded great deference by a reviewing court." Arizona v. Washington, 434 U.S. at 510.

Before the district court declared the mistrial in this case, it had given two Allen charges and had seen evidence that the jury was not taking the case seriously. Moreover, the jury foreman had told the court that it was not possible for the jury to reach a verdict, that some of the jurors had stated that they would not change their minds no matter what happened, and that resumption of deliberations the following Monday would be fruitless. See United States v. Salvador, 740 F.2d at 755 (9th Cir. 1984) ("[J]ury's own statement that it is unable to reach a verdict is the most critical factor [in determining whether a mistrial is manifestly necessary]"), cert. denied, 469 U.S. 1196 (1985). Given the fact that this was a short trial with no complex issues, the district court quite properly concluded that further deliberations would not

result in a verdict. Further review of that fact-bound determination is not warranted.

CONCLUSION

The petition for a writ of certiorari should be granted as to the first question presented. With respect to the second question presented, the petition should be denied.

Respectfully submitted.

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